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Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 05–65 OF 2005(W)

B AHMAD FAIRUZ CHEIF JUSTICE, RICHARD MALANJUM CJ (SABAH & SARAWAK), ALAUDDIN, NIK HASHIM AND AUGUSTINE PAUL FCJJ

28 DECEMBER 2006

C *Criminal Procedure — Appeal — Procedures for, principles governing — Whether appeal to Federal Court was competent — Appeal against decision of Court of Appeal on appeal against decision of High Court — High Court was exercising its power of revision over ruling made by sessions court — Whether appeal was competent pursuant to s 87 — Whether decision made in the exercise of revisionary power was part of the original*

D *jurisdiction of the High Court thereby rendering decision appealable — Courts of Judicature Act 1964 s 87*

Criminal Procedure — Jurisdiction of court — Federal Court — Appellate jurisdiction of Federal Court — Interpretation of arts 121(2)(a) and 128(3) — Whether s 87 of the

E *Courts of Judicature Act 1964 which limits appellate jurisdiction of Federal Court was unconstitutional*

Criminal Procedure — Jurisdiction of court — Federal Court — Inherent jurisdiction — Whether Federal Court could only review its own decisions and not decisions made by the

F *Court of Appeal — Whether r 137 was lawful — Courts of Judicature Act 1964 s 16 — Rules of the Federal Courts 1995 rr 99 & 137 — Civil Law Act 1956 s 3(1)(a)*

Criminal Procedure — Jurisdiction of court — High Court — Whether exercise of

G *revisionary power by High Court was an exercise of its original jurisdiction — Courts of Judicature Act 1964 s 87*

The accused was charged in the Sessions Court at Kuala Lumpur with an offence

H under s 409 of the Penal Code. He claimed trial. On 26 April 2005, the prosecution sought to admit in evidence, in the course of its case, the evidence of six witnesses recorded in Hong Kong pursuant to s 8(3) of the Mutual Assistance in Criminal Matters Act 2002. The defence objected to the admissibility of the record of evidence. The learned sessions court judge upheld the objection on the ground that

I there was no compliance with the Evidence Act 1950 and the Criminal Procedure Code. Accordingly, he ruled that the record of evidence was inadmissible. The prosecution then requested the High Court to revise the ruling made by the learned sessions court judge. On 29 April 2005, the High Court exercised its power of revision and ordered that the record of proceedings be admitted in evidence. The accused appealed to the Court of Appeal. The appeal was dismissed by the Court

of Appeal. The accused then filed a notice of appeal in this court pursuant to s 87 of the Courts of Judicature Act 1964 ('CJA'). The accused also filed a motion under r 137 of the Rules of the Federal Courts 1995 praying for this court to exercise its inherent jurisdiction to review the decision of the Court of Appeal.

When the hearing commenced in this court it was contended by the prosecution that the appeal was not competent pursuant to s 87 as it was not in relation to a criminal matter decided by the High Court in the exercise of its original jurisdiction. Arguments were advanced by both parties on the constitutional validity of s 87 as to whether it violated art 121(2)(a) of the Federal Constitution. The accused argued that a decision made in the exercise of revisionary power is part of the original jurisdiction of the High Court thereby rendering the decision appealable under s 87. With regard to the motion filed by the defence under r 137 the prosecution said that the rule did not come within the meaning of s 16 of the CJA pursuant to which it was made. It was argued that any rule made under s 16 must be procedural in nature and refer to a matter over which the Federal Court has jurisdiction. Accordingly, it was said that r 137 is not valid as it did not satisfy the requirements of s 16. It was also contended that in any event this was not a case where the defence could avail itself of the inherent jurisdiction of the court.

The issues before the court were, inter alia: (1) whether s 87 was constitutional; (2) whether r 137 comes within the scope of s 16 of the CJA under which it was made; and (3) whether the inherent power of the Federal Court is available only to review its own decisions or also extends to reviewing decisions made by the Court of Appeal. The accused also submitted that in exercising his revisionary power the High Court judge was actually exercising his original jurisdiction within the meaning of s 87 of the CJA. The learned deputy public prosecutor in reply argued that the exercise of revisionary power was nothing more than a continuation of the proceeding in the subordinate court in respect of the same case.

Held:

(1) (per **Augustine Paul FCJ**) Articles 128(1) and (2) of the Federal Constitution do not deal with the appellate jurisdiction of the Federal Court, while art 128(3) deals with just such jurisdiction. As they do not deal with the same subject matter, it follows that art 128(3) is inapplicable to art 128(1) and (2). Thus, art 128(3) must be read with other parts of the constitution with which it has a bearing. This brings into focus art 121(2)(a). However, there will be an inconsistency between them if they are read together. The conflict between arts 121(2)(a) and 128(3) can be resolved if they can be construed as dealing with different subject matters. The meaning of both the articles is governed by the use of the word 'jurisdiction' in them (see paras 24–25).

(2) (per **Augustine Paul FCJ**) As art 128(3) is a limitation and qualification upon the general power contained in art 121(2)(a) it must therefore be construed as a proviso to art 121(2)(a). Accordingly, when art 128(3) is read as a proviso to art 121(2)(a) the jurisdiction of the Federal Court to determine appeals shall be such as may be provided by Federal law. This approach will give a harmonious interpretation to arts 121(2)(a) and 128(3) and will not affect the validity of either one of them. The result is that the constitutionality of s 87

cannot be impugned as it is a federal law enacted to confer jurisdiction on the Federal Court to determine appeals on the authority of arts 121(2)(a) and 128(3) read together (see para 42).

(3) (per **Augustine Paul FCJ**) Any rule made under s 16(a) must be procedural in nature and must be in respect of matters over which the courts have jurisdiction. Condition (a) of s 16(a) has therefore been satisfied as r 137 is procedural in nature. Condition (b) of s 16(a) requires a consideration of whether the inherent power is a matter over which the courts have jurisdiction. The inherent power under r 137 is a necessary element of the jurisdiction of the court. Thus, r 137 does not give any new powers; it only provides that those which the court already inherently possesses shall be preserved and is inserted lest it should be considered that the only powers possessed by the court are those expressly conferred by law. It follows that the inherent jurisdiction of the superior courts under the common law has been made applicable to Malaysia by s 3(1)(a) of the Civil Law Act 1956. Accordingly, it comes within the meaning of art 121(2)(c) as it is a jurisdiction that has been preserved, not by, but under federal law. As r 137 relates to a matter in respect of which the courts have jurisdiction it means that condition (b) of s 16(a) has also been satisfied. The corollary is that r 137 comes within the scope of s 16(a) and is therefore lawful (see paras 45–49).

(4) (per **Augustine Paul FCJ**) The language of r 137 is not restrictive so as to limit its application to only reviewing decisions of the Federal Court. The words 'hear any application ….' in part (a) of r 137 are of wide import and indicate that an application that may be heard by the Federal Court under r 137 is not one that is confined to a matter arising in that court only. Similarly the words ' … make any order …' in part (b) of r 137 indicate that they are wide enough to extend to the making of orders even in respect of matters that did not arise in the Federal Court (see paras 50–51).

(5) (per **Augustine Paul FCJ**) Rule 99 deals with the procedure to be followed in all applications in the Federal Court in criminal matters which would include, as of necessity, one under r 137. It provides that a copy of the application shall be filed ' … in the registry of the Court of Appeal where the judgment, order or decision complained of was given or made.' This relates to a complaint in respect of a judgment, order or decision of the Court of Appeal. It is implicit that r 99 does not give the right to make the complaint but only prescribes the procedure to be followed when there is a complaint. Under the Rules of the Federal Court there is no other rule dealing with the right to make such a complaint except for r 137. An application may therefore be made to the Federal Court in respect of a complaint regarding any judgment, order or decision of the Court of Appeal. Rule 99(2) makes it clear that such a complaint is different from an appeal. It follows that an application may be made to the Federal Court under r 137 even in respect of matters decided by the Court of Appeal. The result of the context and wide range of r 137 is that the words 'the Court' in part (c) must be construed as 'any Court' and not as provided in s 2 of the Rules of the Federal Court. Such a departure from the meaning given to a particular word in the definition clause of a statutory provision is permissible if the context in which the word is used warrants it.

Thus the Federal Court may review decisions made by the Court of Appeal in the exercise of its inherent powers. The inherent power of the Federal Court under r 137 can therefore be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy. The accused was therefore entitled to pursue his complaint in this court in the exercise of its inherent jurisdiction under r 137. The burden is on him to satisfy this court that the requirements of r 137 have been complied with (see paras 53, 65 & 67).

(6) (per **Richard Malanjum CJ (Sabah & Sarawak)**) Sections 22 to 25 of the CJA stipulate what are the original jurisdictions of the High Court. Section 31 under which the learned High Court judge in this matter acted upon is not included. In other words the exercise of revisionary power by the High Court judge is not in law an exercise of his original jurisdiction and hence does not come within the ambit of s 87 of the CJA (see paras 13–14).

(7) (per **Richard Malanjum CJ (Sabah & Sarawak)**) Although s 35 of CJA refers to supervisory jurisdiction of the High Court together with its revisionary jurisdiction, the exercise of supervisory power is generally in relation to the additional powers of the High Court given under s 25 of CJA to issue what is commonly known as the prerogative writs such as certiorari, mandamus and prohibition. It entails the commencement of a proceeding in the High Court itself unlike an exercise of revisionary power where it is preceded with an existing proceeding in the subordinate court. This matter under consideration is a good illustration. There is therefore merit in the contention by the learned deputy when he highlighted the fact that the High Court judge was only exercising his revisionary power on an interlocutory issue in relation to a case which is still pending in the sessions court (see para 15).

[Bahasa Malaysia summary

Tertuduh telah didakwa di Mahkamah Sesyen Kuala Lumpur dengan kesalahan di bawah s 409 Kanun Keseksaan. Beliau mohon dibicarakan. Pada 26 April pihak pendakwaan meminta untuk menerima masuk keterangan, untuk perjalanan kesnya, keterangan enam saksi yang direkodkan di Hong Kong menurut s 8(3) Akta Bantuan Bersama Dalam Perkara Jenayah 2002. Pihak pembelaan membantah kepada kebolehterimaan rekod keterangan. Hakim mahkamah sesyen yang bijaksana mengesahkan bantahan tersebut atas alasan bahawa tidak mematuhi Akta Keterangan dan Kanun Tatacara Jenayah. Oleh sebab itu, beliau telah memutuskan bahawa rekod keterangan adalah tidak boleh diterima. Pihak pendakwaan kemudiannya telah meminta Mahkamah Tinggi untuk menyemak keputusan yang telah dibuat oleh hakim mahkamah sesyen yang bijaksana. Pada 29 April 2005, Mahkamah Tinggi telah menggunakan kuasanya untuk menyemak dan memerintahkan bahawa rekod prosiding diterima masuk sebagai keterangan. Tertuduh merayu kepada Mahkamah Rayuan. Rayuan telah ditolak oleh Mahkamah Rayuan. Tertuduh kemudiannya memfailkan notis rayuan ke mahkamah ini menurut s 87 Akta Mahkamah Kehakiman 1964 ('AMK'). Tertuduh juga menfailkan satu usul di bawah k 137

Kaedah-Kaedah Mahkamah Persekutuan 1995 memohon mahkamah ini untuk menggunakan bidang kuasa sedia ada untuk mengkaji semula keputusan Mahkamah Rayuan.

Apabila pendengaran bermula di mahkamah ini, pihak pendakwaan telah menegaskan bahawa rayuan adalah tidak kompeten menurut s 87 yang mana ianya adalah tidak berkaitan dengan perihal jenayah yang diputuskan oleh Mahkamah Tinggi di dalam menggunakan bidang kuasa asalnya. Hujahan yang diutarakan oleh kedua-dua belah pihak adalah di atas kesahan berperlembagaan s 87 sama ada ianya mencabuli perkara 121(2)(a) Perlembagaan Persekutuan. Tertuduh menegaskan bahawa keputusan yang dibuat dalam menggunakan kuasa penyemakan adalah sebahagian daripada bidang kuasa asal Mahkamah Tinggi dengan itu menyebabkan keputusan boleh dirayu di bawah s 87. Berkenaan dengan usul yang difailkan oleh pihak pembelaan di bawah k 137, pihak pendakwaan menyatakan bahawa kaedah tersebut tidak termasuk di dalam maksud s 16 AMK tertakluk kepada yang mana satu ianya dibuat. Ianya adalah ditegaskan bahawa mana-mana kaedah dibuat di bawah s 16 mestilah bersifat prosedur dan merujuk kepada perkara yang mana Mahkamah Persekutuan mempunyai bidang kuasa. Oleh sebab itu, ianya dinyatakan bahawa k 137 adalah tidak sah yang mana ianya tidak memenuhi keperluan s 16. Ianya ditegaskan juga bahawa di dalam apa jua keadaan ini bukanlah satu kes yang mana pembelaan boleh tidak berhasil secara sendiri oleh bidang kuasa sedia ada mahkamah.

Isu-isu di hadapan mahkamah adalah antara lainnya: (1) sama ada s 87 adalah berperlembagaan; (2) sama ada s 137 termasuk di dalam skop s 16 AMK di bawah di mana ianya dibuat; dan (3) sama ada kuasa sedia ada Mahkamah Persekutuan adalah ada hanya untuk menyemak keputusannya sendiri atau juga menjangkau kepada menyemak semula keputusan yang dibuat oleh Mahkamah Rayuan. Tertuduh juga menghujahkan bahawa dalam menggunakan kuasa semakannya, hakim Mahkamah Tinggi adalah sebenarnya menggunakan bidang kuasa asalnya yang termasuk di dalam maksud s 87 AMK. Timbalan pendakwa raya yang bijaksana dalam balasannya menegaskan bahawa penggunaan kuasa semakan semula adalah tidak lebih daripada sambungan prosiding di mahkamah rendah berkenaan dengan kes yang sama.

Diputuskan:

(1) (oleh **Augustine Paul HMP**) Perkara 128(1) dan (2) Perlembagaan Persekutuan tidak membincangkan bidang kuasa rayuan Mahkamah Persekutuan, manakala perkara 128(3) hanya membincangkan bidang kuasa. Oleh kerana ianya tidak membincangkan perkara yang sama, ia mengikuti bahawa perkara 128(3) adalah tiada kena-mengena dengan perkara 128(1) dan (2). Oleh yang demikian, perkara 128(3) mestilah dibaca dengan bahagian lain perlembagaan dengan yang mana ianya layak. Tumpuan membawa kepada perkara 121(2)(a). Walau bagaimanapun, terdapatnya ketidakselarasan di antara mereka jika mereka dibaca bersama. Konflik di antara perkara 121(2)(a) dan 128(3) boleh diselesaikan jika mereka boleh ditafsirkan

apabila membincangkan perkara yang berlainan. Maksud kedua-dua perkara dikawal oleh penggunaan perkataan 'bidang kuasa' di dalamnya (lihat perenggan 24–25).

(2) (oleh **Augustine Paul HMP**) Oleh kerana perkara 128(3) adalah pengehadan dan pensyaratan terhadap kuasa am yang terkandung di dalam perkara 121(2)(a) oleh itu ianya mestilah ditafsirkan sebagai satu proviso kepada perkara 121(2)(a). Sewajarnya, apabila perkara 128(3) dibaca sebagai proviso kepada perkara 121(2)(a) bidang kuasa Mahkamah Persekutuan untuk menentukan rayuan seharusnya seperti mana diperuntukkan oleh undang-undang persekutuan. Pendekatan ini memberikan pentafsiran yang harmoni kepada perkara 121(2)(a) dan perkara 128(3) dan tidak akan menjejaskan kesahan salah satu daripada mereka. Keputusannya adalah keperlembagaan s 87 tidak boleh dipersoalkan yang mana ianya adalah undang-undang persekutuan yang digubal untuk mengurniakan bidang kuasa kepada Mahkamah Persekutuan untuk menentukan rayuan di atas kewibawaan perkara 121(2)(a) dan 128(3) dibaca bersama (lihat perenggan 42).

(3) (oleh **Augustine Paul HMP**) Mana-mana kaedah yang dibuat di bawah s 16(a) mestilah bersifat prosedural dan mestilah berkenaan dengan perkara yang mana mahkamah mempunyai bidang kuasa. Syarat (a) daripada s 16(a) telah dipenuhi yang mana k 137 adalah bersifat prosedural. Syarat (b) daripada s 16(a) memerlukan pertimbangan sama ada kuasa sedia ada adalah perkara yang mana mahkamah mempunyai bidang kuasa. Kuasa sedia ada di bawah k 137 adalah elemen penting daripada bidang kuasa mahkamah. Oleh yang demikian, k 137 tidak memberikan kuasa baru; ianya hanya menyediakan yang mana mahkamah sudah pun sedia ada memilikinya perlu dikekalkan dan dimasukkan kalau-kalau ianya perlu dipertimbangkan bahawa kuasa yang hanya dimiliki oleh mahkamah adalah yang mana secara khusus dianugerahkan oleh undang-undang. Ianya mengikut bahawa, bidang kuasa sedia ada mahkamah yang lebih tinggi di bawah *Common Law* telah dapat digunakan di Malaysia melalui s 3(1)(a) Akta Undang-Undang Sivil 1956. Sewajarnya, ianya datang di dalam maksud perkara 121(2)(c) yang mana bidang kuasanya telah dikekalkan, bukannya dengan tetapi di bawah undang-undang persekutuan. Oleh sebab k 137 berkaitan dengan perkara yang berkaitan dengan mahkamah yang mempunyai bidang kuasa ianya bermaksud bahawa syarat (b) daripada s 16(a) juga telah dipenuhi. Natijahnya adalah k 137 termasuk di dalam skop s 16(a) dan oleh yang demikian adalah sah (lihat perenggan 45–49).

(4) (oleh **Augustine Paul HMP**) Bahasa k 137 adalah tidak terhad oleh itu berkenaan dengan batasan penggunaannya kepada hanya semakan keputusan Mahkamah Persekutuan. Perkataan 'mendengar apa-apa permohonan … 'dalam bahagian (a) k 137 adalah kemasukan yang luas dan menunjukkan bahawa permohonan yang mungkin didengar oleh Mahkamah Persekutuan di bawah k 137 bukannya terbatas kepada perkara yang timbul di dalam mahkamah tersebut sahaja. Sama juga dengan perkataan '… membuat apa-apa perintah…'di dalam bahagian (b) k 137 yang menunjukkan bahawa ianya

A cukup luas untuk melanjutkan kepada membuat perintah walaupun di dalam perkara yang tidak timbul di dalam Mahkamah Persekutuan (lihat perenggan 50–51).

(5) (oleh **Augustine Paul HMP**) Kaedah 99 membincangkan berkenaan dengan tatacara yang perlu diikuti di dalam kesemua permohonan di Mahkamah B Persekutuan berkenaan jenayah yang mana termasuk yang mana adalah penting adalah di bawah k 137. Ianya menyediakan bahawa satu salinan permohonan hendaklah di failkan ' … kepada pendaftar Mahkamah Rayuan di mana penghakiman, perintah atau keputusan yang dikatakan diberikan atau dibuat'. Ini berkaitan dengan aduan berkenaan dengan satu-satu penghakiman, C perintah atau keputusan Mahkamah Rayuan. Secara tersiratnya bahawa k 99 tidak memberikan hak untuk membuat aduan tetapi hanya menentukan tatacara yang perlu diikuti apabila terdapatnya aduan. Di bawah Kaedah-Kaedah Mahkamah Persekutuan tidak terdapatnya kaedah yang membincangkan hak untuk membuat aduan tersebut kecuali k 137. D Satu permohonan bolehlah dibuat kepada Mahkamah Persekutuan berkaitan dengan aduan berkenaan dengan apa-apa penghakiman, perintah atau keputusan Mahkamah Rayuan. Kaedah 99(2) membuatnya jelas bahawa aduan tersebut adalah berbeza daripada rayuan. Diikuti bahawa satu permohonan berkemungkinan dibuat kepada Mahkamah Persekutuan di bawah k 137 walaupun berkenaan dengan perkara yang diputuskan oleh E Mahkamah Rayuan. Keputusan berkenaan dengan konteks dan julat yang luas k 137 adalah perkataan 'mahkamah' di dalam bahagian (c) mestilah ditafsirkan sebagai 'mana-mana mahkamah' dan bukan seperti mana yang disediakan di dalam s 2 Kaedah-Kaedah Mahkamah Persekutuan. Penyimpangan tersebut daripada maksud yang diberikan kepada perkataan tertentu di dalam tafsiran F klausa satu-satu peruntukan statutori adalah dibenarkan jika konteks di mana perkataan yang digunakan membenarkannya. Oleh itu, Mahkamah Persekutuan boleh menyemak keputusan dibuat oleh Mahkamah Rayuan dalam menggunakan kuasa sedia adanya. Kuasa sedia ada Mahkamah Persekutuan di bawah k 137 boleh digunakan untuk mencegah ketidakadilan atau mencegah penyalahgunaan proses mana-mana mahkamah di mana tidak G perdapatnya remedi. Oleh yang demikian, tertuduh adalah berhak untuk meneruskan aduan di mahkamah ini di dalam menggunakan bidang kuasa sedia adanya di bawah k 137. beban adalah ke atasnya untuk memuaskan hati mahkamah bahawa syarat-syarat k 137 telah dipenuhi (lihat perenggan 53, 65 & 67).

H (6) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Seksyen 22 hingga 25 CJA menetapkan berkenaan dengan bidang kuasa asal Mahkamah Tinggi. Seksyen 31 yang mana hakim Mahkamah Tinggi yang bijaksana bertindak dalam perkara ini adalah tidak termasuk. Dalam erti kata lain penggunaan kuasa penyemakan oleh Mahkamah Tinggi bukanlah di dalam undang-undang I menggunakan bidang kuasa asalnya dan oleh sebab itu ianya bukanlah di dalam lingkungan s 87 AMK (lihat perenggan 13–14).

(7) (oleh **Richard Malanjum HB (Sabah & Sarawak)**) Walaupun s 35 CJA merujuk kepada bidang kuasa penyeliaan Mahkamah Tinggi bersama-sama dengan bidang kuasa penyemakannya, penggunaan kuasa penyeliaan adalah

secara am berhubung dengan kuasa tambahan Mahkamah Tinggi yang diberikan di bawah s 25 AMK untuk menyatakan apa yang biasa diketahui sebagai writ prerogatif seperti certiorari, mandamus dan larangan. Ianya memerlukan permulaan prosiding di Mahkamah Tinggi itu sendiri tidak seperti penggunaan kuasa penyemakan di mana ianya didahului dengan prosiding sedia ada di mahkamah rendah. Perkara ini di bawah pertimbangan adalah contoh yang baik. Oleh yang demikian terdapatnya merit di dalam pendapat timbalan yang bijaksana apabila beliau menekankan fakta bahawa hakim Mahkamah Tinggi hanya menggunakan kuasa penyemakannya berkenaan dengan isu interlokutori yang berkaitan dengan kes yang masih belum selesai di mahkamah sesyen (lihat perenggan 15).]

Notes

For cases on High Court jurisdiction, see 5(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2161–2172.

For cases on procedures for, principles governing, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 552–569.

Cases referred to

A Venkateswara Rao v K Sibaiah AIR 1978 AP 403 (refd)
Abubacker Kunju v Thulasidas 1995 CrLJ 1664 (refd)
Ahmad Yani bin Ismail & Anor v Inspector General of Police & Ors [2005] 4 MLJ 636 (refd)
Anowar Hussain v Ajoy Kumar AIR 1965 SC 1651 (refd)
Balmer Lawrie and Co Ltd v Assam Brook Estates Ltd AIR 1979 Cal 64 (refd)
Blackwood v R [1882] 8 App Cas 82 (refd)
Bywater v Brandling [1828] 7 B&C 643 (refd)
Canada Sugar Refining Co v R [1898] AC 741 (refd)
Chan Yock Cher v Chan Teong Peng [2005] 1 MLJ 101 (refd)
Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (refd)
Chu Tak Fai v Pendakwa Raya [2007] 1 MLJ 201 (refd)
Commissioner of Income Tax Punjab v Shree Jagan Nath AIR 1957 Punjab 226 (refd)
Connelly v DPP [1964] 2 All ER 401 (refd)
Courtauld v Legh [1869] LR 4 Ex 126 (refd)
Dato Seri Anwar bin Ibrahim v PP [2004] 3 MLJ 517 (refd)
Eastbourne Corpn v Fortes Ltd [1959] 2 All ER 102 (refd)
Emperor v Nazir Ahmad AIR 1945 PC 18 (refd)
Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 MLJ 268 (refd)
Garthwaite v Garthwaite [1964] 2 All ER 233 (refd)
Govt of the Province of Bombay v Hormusji Manekji AIR 1947 PC 200 (refd)
Gurunath Narayan Betgori, Re (Criminal Revision Application No 80 of 1924) AIR 1924 Bom 485 (refd)
Hari Shankar Dinanath v State of Madhya Pradesh AIR 1953 Nag 254 (refd)
Jennings v Kelly [1940] AC 206 (refd)
Ku Izham bin Ku Adnan v Public Prosecutor [1998] 5 MLJ 720 (refd)
Kunhammad v Abdul Kader [1977] KLT 840 (refd)
Kurukshetra University v State of Haryana AIR 1977 SC 2229 (refd)
Lam Kong Co Ltd v Thong Guan Co Ptd Ltd [2000] 4 MLJ 1 (refd)

Lee Lee Cheng v Seow Peng Kwang [1960] MLJ 1 (refd)
Local Government Board v South Stonehan Union [1909] AC 57 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)
M Nanawati v State of Bombay AIR 1961 SC 112 (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun [2002] 2 MLJ 673 (refd)
Mahesh Chandra Gupta v State of MP AIR MP 226 (refd)
Manoharlal Chopra v Seth Hiralal AIR 1962 SC 527 (refd)
Marudayya Thevar v Shanmugasundara Thevar AIR 1926 Mad 139 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113 (refd)
Mort v Bradley [1916] SALR 129 (refd)
R v Shurmer [1886] 17 QBD 323 (refd)
Raj Rani v Dwarka Nath AIR 1933 Oudh 491 (refd)
Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Sarwan Ram v Amar Nath AIR 1980 Punj & Haryana 162 (refd)
Shah Bhojraj Kuverji Oil Mills and Ginning Factory v Subhash Chandra Yograj Sinha AIR 1961 SC 1596 (refd)
Shantaram Tukram Patil v Dagubai Tukram AIR 1987 Bom 182 (refd)
State of Punjab v Kasturi Lal AIR 1999 SC 2554 (refd)
Talab Haji Hussain v Madhukar Purshottam Mondkar AIR 1958 SC 376 (refd)
Tengku Abdul Muiz Shah & Ors v Public Prosecutor [1983] 1 MLJ 422 (refd)
Wilson v Nightingale [1846] 8 QB 1034 (refd)
Wood v Riley [1867] LR 3 CP 26 (refd)
Vedehi Saran v Municipal Board Kouch 1978 All LJ 907 (refd)
Vishnu Deshpande v Emperor AIR 1941 Nag 97 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)(a)
Code of Civil Procedure [India] s 151
Courts of Judicature Act 1964 ss 16, 22, 23, 24, 25, 31, 35, 87
Criminal Procedure Code ss 311, 315, 316, 317, 323, 325
Criminal Procedure Code [India] s 482
Evidence Act 1950
Federal Constitution arts 2, 121(2)(a), 128(3)
Mutual Assistance in Criminal Matters Act 2002 s 8(3)
Penal Code s 409
Rules of the Federal Court 1995 rr 99, 137

Appeal from: Criminal Appeal No W–09–27 of 2005 (Court of Appeal, Putrajaya)

Muhammad Shafee Abdullah (Frida Krishnan, Amy Chong Boon Chin and Maalini Abishegam with him) (Shafee & Co) for the appellant.

Yusuff Zainal Abiden (Tun Abdul Majid Tun Hamzah with him) (Attorney General's Chambers) for the respondent.

Richard Malanjum CJ (Sabah & Sarawak):

[1] I have the advantage of reading in draft the judgment of Augustine Paul FCJ ('the main judgment'). On the issues discussed therein, I am in agreement with his conclusions.

[2] However, I noted that there is another aspect in the submission of learned counsel for the applicant which should be considered. The gist of his submission is that in exercising his revisionary power the High Court judge was actually exercising his original jurisdiction within the meaning of s 87 of the Courts of Judicature Act 1964 ('the CJA').

[3] The learned deputy public prosecutor in reply argued otherwise. He submitted that the exercise of revisionary power was nothing more than a continuation of the proceeding in the subordinate court in respect of the same case.

[4] I think the point raised can be determined without dwelling into the facts of this case which have already been adequately dealt with in the main judgment. What needs to be examined here is the law which deals with the nature of jurisdiction of the High Court when it exercises its revisionary power.

[5] Sections 31 and 35 of the CJA stipulate certain powers of the High Court and they read:

Section 31 CJA

Revision of criminal proceedings of subordinate courts The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts *in accordance with any law for the time being in force relating to criminal procedure.*

Section 35 CJA

General supervisory and revisionary jurisdiction of High Court

(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, *if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal,* in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.' (Emphasis added.)

[6] In the Criminal Procedure Code ('CPC') there are also provisions which empower a judge of the High Court with revisionary power. They are ss 323 and 325 which read:

> Section 323 CPC
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> Powers to call for records of subordinate Courts
>
> (1) *A judge may call for and examine the record of any proceeding before any subordinate Criminal Court* for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
>
> (2) Orders made under ss 97 and 98 are not proceedings within the meaning of this section.
>
> Section 325 CPC
>
> Powers of Judge on revision
>
> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by ss 311, 315, 316 and 317 of this Code.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction. (Emphasis added.)

[7] Subsection (1) of s 325 therefore empowers a High Court judge in the course of exercising his revisionary power, after calling for the record of proceedings *suo motu* or after it came to his knowledge, to make such order as may be made under Criminal Procedure Code ss 311, 315, 316 and 317 of the CPC, namely, the respective powers of a High Court judge to order a stay of execution pending appeal, the arrest of respondent in certain cases pending an appeal against acquittal, to make a decision as though there is an appeal before the High Court and the making of an order to take further evidence. But there is no power to reverse an acquittal to one of conviction when exercising his revisionary power. Subsection (3) thereof makes it clear.

[8] Now, in the matter before us the learned High Court judge in his written judgment made it very clear that he was exercising his revisionary power pursuant to s 31 of the CJA read with s 323 of the CPC. Was he therefore exercising an original jurisdiction notwithstanding that he invoked these relevant statutory provisions? For if he was, then his decision would be within the ambit of s 87 of the CJA which reads:

> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal *in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction* subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal. (Emphasis added.)

[9] It has been said that a 'revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party. It cannot be said that a proceeding in revision is a continuation of the suit, appeal or trial. It is only a step-in-aid for invoking the powers of superintendence by the sessions court judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts. Interference in revision being a discretionary power vested in the superior courts, a revision petition cannot be considered to be a continuation of the proceedings pending in the trial court or the appellate court' (see *Kunhammad v Abdul Kader* [1977] KLT 840). Similarly, in *Ku Izham bin Ku Adnan v Public Prosecutor* [1998] 5 MLJ 720 it was said that the 'object of a revision is to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted in some injury to the due maintenance of law and order or in some undeserved hardship to individuals. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court.

[10] At first blush, the foregoing views may seem to be in tandem with the analogy drawn by learned counsel for the accused on the similarity between the exercise of revisionary power and the supervisory power of the High Court. The latter is an exercise of its original jurisdiction.

[11] However, to agree with the analogy made will be failing to consider the other relevant statutory provisions which are equally pertinent. Such an approach was adopted in *Lam Kong Co Ltd v Thong Guan Co Ptd Ltd* [2000] 4 MLJ 1 when considering the issue of whether the Court of Appeal retained any revisionary power. His Lordship Mohammed Dzaiddin FCJ (as he then was) proceeded to examine the existing statutory provisions and went on to say this at p 15:

> It is trite that the Court of Appeal today no longer has any original jurisdiction after the repeal of ss 45–49 of the Act by the Courts of Judicature (Amendment) Act 1994 (Act A886) what remains is its criminal and civil appellate jurisdiction.

[12] This pronouncement, and thus by implication the approach, was recently approved by this court in *Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 when it accepted as correct the foregoing statement. Hence, to determine whether or not a particular exercise of power by the High Court is made pursuant to its original jurisdiction, it must necessarily depend on the statutory provision which governs it. For now one has to accept the fact that the jurisdictions of the courts in this country have been statutory demarcated. This is allowed by the Federal Constitution (arts 121 and 128 (3)).

[13] Sections 22 to 25 of the CJA stipulate what are the original jurisdictions of the High Court. Section 31 under which the learned High Court judge in this matter acted upon is not included. I think the view expressed by Mohamed Dzaiddin J (as he then was) in the case of *Tengku Abdul Muiz Shah & Ors v Public Prosecutor* [1983] 1 MLJ 422 sums up the true position of the law when he said this, inter alia, at p 423:

> … Except for certain articles in the Constitution (See arts 121, 122A, 122B, 122C; 123; 126.), the powers and jurisdiction of the High Court are governed by the Courts of Judicature Act 1964. In the sphere of criminal jurisdiction, the High Court has three jurisdictions, namely, original, appellate and revisionary. With regard to its original jurisdiction, s 22(1)(a)(i) of the Act states that the High Court shall have jurisdiction to try all offences committed within its local jurisdiction…. Lastly, under s 31 of the Act, the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts. Thus, so far it is clear that the High Court has jurisdiction to try all offences committed within its local jurisdiction and to hear appeals and to exercise powers of revision from subordinate courts.'

[14] In other words the exercise of revisionary power by the High Court judge is not in law an exercise of his original jurisdiction and hence does not come within the ambit of s 87 of the CJA. That should therefore answer the point raised by learned counsel for the accused.

[15] Even if the foregoing approach is deemed too simplistic a view to take, it still does not justify equating wholly the revisionary power of the High Court to its supervisory power as ordinarily understood. To do so would be ignoring the stark differences in the two judicial functions of the High Court. No doubt the end result of each may be quite similar in that both are intended to correct or rectify any error committed by an inferior tribunal, an adjudicating body or a subordinate court. But the similarity ends there. Although s 35 of the CJA refers to supervisory jurisdiction of the High Court together with its revisionary jurisdiction, the exercise of supervisory power is generally in relation to the additional powers of the High Court given under s 25 of the CJA to issue what is commonly known as the prerogative writs such as certiorari, mandamus and prohibition. It entails the commencement of a proceeding in the High Court itself unlike an exercise of revisionary power where it is preceded with an existing proceeding in the subordinate court. This matter under consideration is a good illustration. There is therefore merit in the contention by the learned deputy when he highlighted the fact that the High Court judge was only exercising his revisionary power on an interlocutory issue in relation to a case which is still pending in the sessions court.

[16] My answer therefore to the primary question is that an exercise of revisionary power by a High Court Judge is not an exercise of an original jurisdiction so as to bring it within the ambit of s 87 of the CJA.

[17] For the above reasons, the notice of appeal filed by the accused in this court is therefore struck out for want of jurisdiction under s 87 of the CJA.

Augustine Paul FCJ:

[18] Section 87 of the CJA ('s 87') confines the appellate jurisdiction of the Federal Court to a decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction. Accordingly, there is no right of appeal to the Federal Court in a criminal matter that originated in the subordinate courts. Does this violate art 121(2)(a) of the Federal

Constitution ('art 121(2)(a)') which provides that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof without any qualification? If it does, an appeal to the Federal Court will be competent as the restriction on the right of appeal will be unconstitutional. If it does not, by virtue of art 121(2)(a) being read with art 128(3) of the Federal Constitution ('art 128(3)'), does it mean that a person who is dissatisfied with a decision made by the Court of Appeal in respect of a criminal matter that originated in the subordinate courts is left with no further avenue to seek redress? In such circumstances can he invoke the inherent jurisdiction of the Federal Court as contained in r 137 of the Rules of the Federal Court 1995 ('r 137') to seek a remedy? These are the dominant issues that require to be addressed in this proceeding before us.

[19] The accused was charged in the Sessions Court at Kuala Lumpur with an offence under s 409 of the Penal Code together with an alternative charge under the same section. He claimed trial. On 26 April 2005, the prosecution sought to admit in evidence, in the course of its case, the evidence of six witnesses recorded in Hong Kong pursuant to s 8(3) of the Mutual Assistance in Criminal Matters Act 2002. The defence objected to the admissibility of the record of evidence. The learned sessions court judge upheld the objection on the ground that there was no compliance with the Evidence Act 1950 and the Criminal Procedure Code. Accordingly, he ruled that the record of evidence was inadmissible. The prosecution then requested the High Court to revise the ruling made by the learned sessions court judge. On 29 April 2005, the High Court exercised its power of revision and ordered that the record of proceedings be admitted in evidence. The accused appealed to the Court of Appeal. The appeal was dismissed by the Court of Appeal on 1 July 2005. The accused then filed a notice of appeal in this court on 8 July 2005 pursuant to s 87. The accused also filed a motion under r 137 praying for this court to exercise its inherent jurisdiction to review the decision of the Court of Appeal.

[20] When the hearing commenced in this court it was contended by the prosecution that the appeal was not competent pursuant to s 87 as it was not in relation to a criminal matter decided by the High Court in the exercise of its original jurisdiction. Arguments were advanced by both parties on the constitutional validity of s 87 as to whether it violated art 121(2)(a). Learned counsel's argument that a decision made in the exercise of revisionary power is part of the original jurisdiction of the High Court thereby rendering the decision appealable under s 87 will be addressed by YAA Dato' Richard Malanjum CJ (Sabah and Sarawak). With regard to the motion filed by the defence under r 137 the prosecution said that the rule did not come within the meaning of s 16 of the CJA ('s 16') pursuant to which it was made. It was argued that any rule made under s 16 must be procedural in nature and refer to a matter over which the Federal Court has jurisdiction. Accordingly, it was said that r 137 is not valid as it did not satisfy the requirements of s 16. It was also contended that in any event this was not a case where the defence could avail itself of the inherent jurisdiction of the court. We shall now address both the issues argued before us.

A THE CONSTITUTIONAL VALIDITY OF SECTION 87

[21] Article 121(2)(a) provides that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof. The jurisdiction is unqualified. However, art 128(3) provides that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law. The jurisdiction is qualified as it is subject to it being provided by federal law. If the word 'jurisdiction' in art 128(3) is a reference to the jurisdiction conferred by art 121(2)(a) it will result in the wide power contained in art 121(2) being curtailed by the qualification in art 128(3). They will be inconsistent with each other. There is a rule of construction that if two sections of a statute cannot be reconciled it is often said that the last must prevail (see *Wood v Riley* [1867] LR 3 CP 26; *KM Nanawati v State of Bombay* 1961 SC 112). But this rule must be followed only as a matter of last resort. As Lord Evershed MR said in *Eastbourne Corpn v Fortes Ltd* [1959] 2 All ER 102 at p 107:

> It is no doubt true that if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the latter will be preferred. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention.

[22] If, therefore, arts 121(2)(a) and 128(3) are irreconcilable it is art 128(3) that will prevail thereby rendering art 121(2)(a) nugatory. The inconsistency that will arise when arts 121(2)(a) and 128(3) are read together must be avoided. In this regard useful reference may be made to *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 where Raja Azlan Shah FJ (as His Majesty then was) said at p 190:

> When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. A passage from the Privy Council judgment in *Hinds v The Queen* is of some assistance (p 392):
>
> > That the Parliament of Jamaica, has power to create a court … is not open to doubt, but if any of the provisions doing so conflict with the constitution in its present form, then it could only do so effectively if the constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the constitution …
>
> This reasoning, in my view, is based on the premise that the constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government.

And *Bindra's Statutory Interpretation* (9th Ed) says at p 508:

> The acceptable principle of construing statutes is that two provisions regulating the same subject should be construed to be consistent with each other. If this be true of an ordinary statute, it is equally true of such a ruling instrument as the constitution.

[23] What first requires to be resolved is whether art 128(3) can be read as being applicable to only art 128(1) and (2) thus leaving art 121(2)(a) to be interpreted as it reads. This is resolved by *Bindra's Interpretation of Statutes* (9th Ed) which says at pp 1182–1184:

> The constitution must be read as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. If the plain meaning of an uncontradicted constitutional provision is to be disregarded, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. …
>
> In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. The subject, the context, and the intention of the body inserting a word in the federal constitution are all to be considered in determining its construction.

[24] The different provisions of a constitution bearing upon a particular subject must therefore be read together. With regard to the concern expressed earlier, it must be observed that art 128(1) and (2) do not deal with the appellate jurisdiction of the Federal Court while art 128(3) deals with just such jurisdiction. As they do not deal with the same subject matter, it follows that art 128(3) is inapplicable to art 128(1) and (2). Thus, art 128(3) must be read with other parts of the constitution with which it has a bearing. This brings into focus art 121(2)(a). However, as stated earlier there will be an inconsistency between them if they are read together.

[25] The conflict between arts 121(2)(a) and 128(3) can be resolved if they can be construed as dealing with different subject matters. The meaning of both the arts is governed by the use of the word 'jurisdiction' in them. As Diplock LJ, in considering the different senses in which the word 'jurisdiction' can be used, said in *Garthwaite v Garthwaite* [1964] 2 All ER 233 at p 241:

> The High Court is the creation of statute, and its jurisdiction is statutory. As was pointed out by Pickford, LJ, in *Guaranty Trust Co of New York v Hannay & Co* [1914–15] All ER Rep at p 35; [1915] 2 KB at p 563, the expression 'jurisdiction' of a court may be used in two different senses, a strict sense (which he regarded as the only correct one) and a wider sense. I think, with respect, that he defined the strict sense too narrowly, for it would not embrace the court's lack of jurisdiction to entertain a suit based on the personality of a party, as for instance against a foreign sovereign or ambassador. However, it is important for the purposes of the present appeal to distinguish between the two senses in which the expression is used. In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking

A to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense), or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, B including its settled practice to refuse to exercise such powers or to grant relief in particular circumstances.

[26] It is therefore clear that the word 'jurisdiction' can mean, in its narrow and strict sense, the authority and power to hear and determine cases and, in its wider C sense, the manner in which the power is to be exercised. It has been construed by the courts in both the senses or only in one sense depending on the context in which it has been used. Thus, as Hepworth J said in *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1 at p 5:

D It is also necessary to consider the meaning of the word 'jurisdiction' in s 47 of the Courts Ordinance 1948, and the Second Schedule thereto. Every paragraph of the Second Schedule, except one, begins with the word 'jurisdiction' and the word also appears in the heading to that part of the Courts Ordinance in which s 47 appears. *Strouds Judicial Dictionary* (3rd Ed) Vol 2, at p 1544, states that the word 'jurisdiction' can have two meanings, in one sense meaning 'conferring power' and in the other meaning 'an area or district'. In my view a combination of these is the meaning of the word as used in the E Second Schedule, that is that it means the conferring of power to take cognizance of the laws in force in an area or district. If this is taken as its correct meaning then the Second Schedule can be said to confer power on the court to apply the laws as to limitation in the manner prescribed including power to extend time where specific provision for so doing is made.

F **[27]** Further reference may be made to *Anowar Hussain v Ajoy Kumar* AIR 1965 SC 1651 where Sarjoo Prosad CJ said at p 50:

The sense in which the word 'jurisdiction' has been used in s 1 of the Judicial Officers' Protection Act, was laid down in the earliest case of the Allahabad High Court, *Teyen v Ram Lal*, reported in ILR 12 All 115 (F). Sir John Edge CJ, in that case held that 'the word G 'jurisdiction' is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder v Halkel* 2 Moo Ind App 293 (T). It means authority or power to act in a matter and not authority or power to do an act in a particular manner or form.

[28] In *Garthwaite v Garthwaite* Lord Diplock used the word 'jurisdiction' in the H strict sense only. If the word 'jurisdiction' appearing in arts 121(2)(a) and 128(3) can be construed in its different senses the inconsistency between them can be avoided. But is that possible?

[29] In determining the proper meaning and relationship between arts 121(2)(a) I and 128(3), it is necessary to consider the basic rules governing such an exercise. In *Jennings v Kelly* [1940] AC 206, it was held that in construing a section of an Act of Parliament it is constantly necessary to explain the meaning of the words by an examination of the purport and effect of other sections in the same Act. Similarly, in *Canada Sugar Refining Co v R* [1898] AC 741, it was held that every clause of a statute should be construed with reference to the context and the other clauses of the

Act, so as, so far as possible, to make a consistent enactment of the whole statute. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other (see *Gayler v Wilder* 13 L Ed 504). A safe guide to the interpretation of sweeping general words, which are difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them; and if it is found that a number of such expressions have to be subjected to limitations and qualifications, and that such limitations and qualifications are of the same nature, that circumstance forms a strong argument for subjecting the expression in dispute to a like limitation and qualification (see *Blackwood v R* [1882] 8 App Cas 82). As Lord Tenterden said in *Bywater v Brandling* [1828] 7 B & C 643 at p 660:

> In construing Acts of Parliament we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act. And if we find in the preamble or in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause.

[30] Thus, if one section of an Act, for instance, required that 'notice' should be 'given', a verbal notice would, generally, be sufficient, but if another section provided that it should be 'served' on a person, or 'left' with him, or in a particular manner or place, it would obviously show that a written notice was intended (see *Wilson v Nightingale* [1846] 8 QB 1034; *R v Shurmer* [1886] 17 QBD 323). Accordingly, two or more sections of a statute may require to be read together in order to ascertain their proper meaning. Similarly a Constitution must be read as a whole. As Willoughby on *Constitutional Law* Pt I says at p 65:

> The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper and indeed imperative, to construe one part in the light of the provision of the other parts.

[31] At this stage it is pertinent to refer to *Courtauld v Legh* [1869] LR 4 Ex 126 where Cleasby B said that it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament. However, as Craies on *Statute Law* (7th Ed) says at p 169:

> The presumption that the same words are used in the same meaning is however very slight and it is proper, 'if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act' (per Turner LJ in *Re National Savings Bank* [1866] LR 1 Ch App 547, 550).

[32] The presumption that a word has been used consistently will more readily be abandoned if the context in which it appears in one place in an Act compels some other than the ordinary meaning to be placed upon it (see *Mort v Bradley* [1916] SALR 129). In ascertaining the meaning of the word 'jurisdiction' in both the articles, it must be observed that the marginal note to art 121 reads as 'Judicial power of the Federation'. As this article deals with judicial power, the word 'jurisdiction'

appearing in art 121(2)(a) is a reference to the authority and power to determine appeals. In any event, the language of art 121(2)(a) itself shows in clear terms that it deals with the authority to determine appeals and not with the manner of exercise of such power. This is the meaning of the word in its narrow and strict sense. If indeed the word 'jurisdiction' in art 128(3) can be construed in the wider sense there will be harmony between both the articles; while art 121(2)(a) will relate to the authority and power to determine appeals art 128(3) will deal with the provision of federal laws on the manner of exercise of the power. This would depend on the context in which the word 'jurisdiction' has been used in art 128(3) which in turn would depend on the nature of laws that may be provided by federal law. This is controlled, firstly, by the use of the word 'such' in art 128(3) the material part of which states that 'The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court thereof shall be such …'. In commenting on the significance of the word Tek Chand J said in *Commissioner of Income Tax, Punjab v Shree Jagan Nath* AIR 1957 Punjab 226 at p 232:

> In its grammatical usage, and in its natural and ordinary sense, the word 'such' is understood to refer to the last antecedent, unless, the meaning of the sentence would thereby be impaired, which does not seem to be the case here.

[33] The antecedent to the word 'such' in art 128(3) is 'The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof … '. This means that the federal law that may be provided under art 128(3) must be in relation to the jurisdiction of the Federal Court to determine appeals. Secondly, the use of the definite article 'the' as the opening word of art 128(3) is extremely significant to show its extent and ambit. It is defined in *Webster's New World Dictionary* (6th Ed), inter alia, as:

> … the meaning is controlled by the basic notion 'previously recognised, noticed, or encountered' in distinction to A, AN ….

[34] As *Bindra's Interpretation of Statutes* (9th Ed) says at pp 1597–1598:

> As regards implication of the article 'the', refer to *Consolidated Coffee Ltd v Coffee Board, Bangalore* AIR 1980 SC 1468 and *Ishwari Singh v State of Uttar Pradesh* 1980 All LJ 984 (DB). 'The' is the word used before nouns, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant, that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person (*Shri Ishar Alloy Steels Ltd v Jayaswals Naco Ltd* [2001] 3 SCC 609).

[35] The use of the word 'The' preceding the word 'jurisdiction' in art 128(3), that is to say, 'The jurisdiction …', is therefore a reference to a jurisdiction that has been previously recognised. It was previously used in art 121(2)(a). The word 'jurisdiction' has therefore been used in art 128(3) in the same context as it has been used in art 121(2)(a). Since it has been used in the same context in both the articles, it must carry the same meaning.

[36] The corollary is that there will be a conflict between the general power contained in art 121(2)(a) and its qualification contained in art 128(3). While art 121(2)(a) gives an unqualified right of appeal to the Federal Court art 128(3) provides that the right shall be such as may be provided by federal law; thereby empowering the legislature to restrict the right of appeal to the Federal Court. Any restriction on the right of appeal to the Federal Court would conflict with the unqualified power. It is this apparent inconsistency that requires to be resolved bearing in mind the rule, referred to earlier, of construing two provisions in a constitution dealing with the same subject matter to be consistent with each other.

[37] In construing art 121(2)(a) in the light of art 128(3), useful reference may be made to *Goodwin v Phillips* 7 CLR 1 where O'Conner J in referring to a conflict between general and special provisions said at p 14:

> The conflict between the two sections is one of the kinds to which Sir George Jessel MR refers in *Taylor v Oldham Corporation* 4 Ch D 395 where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general proviso, and the general provisions, insofar as it is inconsistent with the special provision, must be deemed not to apply.

[38] This raises the question of whether art 128(3) can be read as a proviso to art 121(2)(a). In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v Subhash Chandra Yograj Sinha* AIR 1961 SC 1596, Hidayatullah J said that as a general rule a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. In *Local Government Board v South Stonehan Union* [1909] AC 57, Lord MacNaghten said that a proviso can be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. The proper way to regard a proviso is as a limitation upon the effect of the principal enactment (see *Raj Rani v Dwarka Nath* AIR 1933 Oudh 491). Its function is to except and deal with a case which would otherwise fall within the general language of the main enactment (see *Vedehi Saran v Municipal Board, Kouch* 1978 All LJ 907). As *Bindra's Interpretation of Statutes* (9th Ed) says at p 111:

> A proviso, which is in fact and in substance a proviso, can only operate to deal with a case, which but for it, would have fallen within the ambit of the section to which it is a proviso. The section deals with a particular field and the proviso excepts or takes out or carves out from the field a particular portion, and therefore it is perfectly true that before a proviso can have any application, the section itself must apply. A proviso is nothing but an exception to the enacting clause. Its object is to cut down or qualify something which has gone before it.

[39] Thus as Kapur J said in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v Subbash Chandra Vograj Sinha* at p 1690:

> The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment.

[40] In view of the function of a proviso the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided (see *Govt of the Province of Bombay v Hormusji Manekji* AIR PC 200). As *Principles of Statutory Interpretation* (10th Ed) by GP Singh says at p 194:

> This is so because, 'the legislative device of exclusion is adopted only to exclude a part from the whole, which but for the exclusion, continues to be a part of it' and words of exclusion are presumed to have some meaning and are not readily recognised as mere surplusage.

[41] As art 128(3) is a limitation and qualification upon the general power contained in art 121(2)(a) it must therefore be construed as a proviso to art 121(2)(a). Accordingly, when art 128(3) is read as a proviso to art 121(2)(a) the jurisdiction of the Federal Court to determine appeals shall be such as may be provided by federal law. This approach will give a harmonious interpretation to art 121(2)(a) and art 128(3) and will not affect the validity of either one of them. The result is that the constitutionality of s 87 cannot be impugned as it is a federal law enacted to confer jurisdiction on the Federal Court to determine appeals on the authority of arts 121(2)(a) and 128(3) read together. The notice of appeal filed by the accused against the decision of the Court of Appeal is therefore not competent. The preliminary objection raised by the prosecution is thus upheld.

[42] The question of whether the accused has any other remedy available to pursue his complaint in the exercise of the inherent jurisdiction of the court will now be considered. The inherent jurisdiction of the court under r 137, r 137 reads as follows:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[43] A matter of immediate consideration, in light of the objection raised by the prosecution, is whether r 137 comes within the scope of s 16 under which it was made. Section 16(a) reads as follows:

> Rules of court may be made for the following purposes:
>
> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, (the Court of Appeal and the Federal Court) in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction (including the procedure and practice to be followed in the registries of those Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court (to the Court of Appeal or to the Federal Court) shall be made

A rule made under s 16(a) must satisfy two conditions. They are:

(a) the rule must be made for the purpose of regulating and prescribing the procedures and the practice to be followed in the High Court, the Court of Appeal and the Federal Court and

(b) the rule must be in respect of matters over which the courts have jurisdiction.

[44] Thus, any rule made under s 16(a) must be procedural in nature and must be in respect of matters over which the courts have jurisdiction. With regard to condition (a) of s 16(a) reference may be made to *Sarwan Ram v Amar Nath* AIR 1980 Punj & Haryana 162 where it was held that s 151 of the Indian Code of Civil Procedure ('s 151'), which is similar to r 137, confers only a procedural jurisdiction. In his article entitled *The Inherent Jurisdiction of the Court: Current Legal Problems*, 1970 Vol 23 Sir Jack Jacob says at p 24:

> The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.

[45] Condition (a) of s 16(a) has therefore been satisfied as r 137 is procedural in nature. Condition (b) of s 16(a) requires a consideration of whether the inherent power is a matter over which the courts have jurisdiction. The inherent power under r 137 is a necessary element of the jurisdiction of the court. As Lord Morris said in *Connelly v DPP* [1964] 2 All ER 401 at p 409:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

And at p 410:

> The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.

[46] Thus, r 137 does not give any new powers; it only provides that those which the court already inherently possesses shall be preserved and is inserted lest it should be considered that the only powers possessed by the court are those expressly conferred by law (see *Emperor v Nazir Ahmad* AIR 1945 PC 18). This view has been recognised by this court in *Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Chan Yock Cher v Chan Teong Peng* [2005] 1 MLJ 101. It is therefore clear that the inherent jurisdiction is of common law origin and is necessary for the court to act effectively within the jurisdiction that has been conferred. However, the assimilation of this common law rule into our judicial system would depend on whether it has been recognised by federal law. This is because art 121(2)(c) of the Federal Constitution ('art 121(2)(c)') provides that the Federal Court shall have such other jurisdiction as may be conferred by or under federal law. In dealing

with the question of whether this common law rule comes within the ambit of art 121(2)(c) Steve Shim CJ (Sabah and Sarawak) said in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 285 at pp 401–402:

> Where there is a clear case of injustice being committed, the Federal Court, as the apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r 137 of the Rules of the Federal Court 1995 ('the RFC'). This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v Ng Swee Keat & Anor* (Civil Appeal No 02–03 of 1998(B), when Mohamed Dzaiddin Chief Justice said:
>
> > Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.
>
> In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) of the Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law.
>
> Section 3(1)(a) under the heading 'Application of UK Common Law, rules of equity and certain statutes', states as follows:
>
> > Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
> >
> > (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956 …
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.'
>
> In 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases (see *Halsbury's Law of England* (4th Ed) Vol 37 para 14).

[47] It follows that the inherent jurisdiction of the superior courts under the common law has been made applicable to Malaysia by s 3(1)(a) of the Civil Law Act 1956 ('s 3(1)(a)'). Accordingly, it comes within the meaning of art 121(2)(c) as it is a jurisdiction that has been preserved, not by, but under federal law. It can now be discerned with ease that cases such as *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268 and *Ahmad Yani bin Ismail & Anor v Inspector General of Police & Ors* [2005] 4 MLJ 636 had expressed their views on the inherent jurisdiction of the Courts without the benefit of the passage from the judgment in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* reproduced earlier. As r 137 relates to a matter in respect of which the courts have jurisdiction it means that condition (b) of s 16(a) has also been satisfied.

[48] The corollary is that r 137 comes within the scope of s 16(a) and is therefore lawful. It must be added that even if it can be argued that r 137 does not conform with the requirements of s 16(a) it makes no difference as r 137 merely preserves what has been brought into force by s 3(1)(a). The power of this court to hear any application or to make any order as may be necessary to prevent injustice under r 137 has been recognised in cases such as *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [2002] 2 MLJ 673 and *Dato Seri Anwar bin Ibrahim v PP* [2004] 3 MLJ 517 and, recently, in *Chu Tak Fai v Pendakwa Raya* [2007] 1 MLJ 201.

[49] The motion before us is for a review of an order made by the Court of Appeal. Thus the resultant matter for consideration is whether the inherent power of the Federal Court is available only to review its own decisions or also extends to reviewing decisions made by the Court of Appeal. The language of r 137 itself is not restrictive so as to limit its application to only reviewing decisions of the Federal Court. Under r 137, the Federal Court has inherent powers:

(a) to hear any application ('part (a)');

(b) or to make any order as may be necessary to prevent injustice ('part (b)');

(c) or to prevent an abuse of the process of the court ('part (c)').

[50] The words 'hear any application …' in part (a) are of wide import and indicate that an application that may be heard by the Federal Court under r 137 is not one that is confined to a matter arising in that court only. Similarly, the words '… make any order …' in part (b) indicate that they are wide enough to extend to the making of orders even in respect of matters that did not arise in the Federal Court. Thomas J, in commenting on the scope and extent of the inherent power contained in s 482 which contains words similar as in part (b), said in *Abubacker Kunju v Thulasidas* 1995 Cr L J 1664:

> It is settled proposition that inherent powers of the High Court envisaged in s 482 of the Code is supervisory in nature 'to give effect to any order under this Code or to prevent abuse of the process of any court'. The words 'or otherwise to secure the ends of justice' in the said section must be construed on the principle of ejusdem generis. When Parliament reserved inherent powers only to the High Courts so far as criminal proceedings are concerned, it is intended to be exercised in respect of proceedings pending in the courts subordinate to it or pending before itself.

[51] This approach is supported by r 99 of the Rules of the Federal Court ('r 99'). It reads as follows:

> (1) All applications shall be made by filing the notice of motion and every affidavit intended to be used in support thereof and eight copies thereof, unless the application is made to a single Judge of the Court in which case two copies only need be filed. Such documents shall be filed in the Registry, and a copy in the Registry of the Court of Appeal where the judgment, order or decision complained of was given or made. Copies of such application and affidavits shall immediately be served on all necessary parties.

A (2) The Registrar of the Court shall follow a procedure similar so far as possible to the procedure relating to the entry of appeals and the Registrar of the Court shall forthwith inform the Public Prosecutor and the applicant and any other necessary party to the application of the place and date of hearing of the application.

B **[52]** Rule 99 deals with the procedure to be followed in all applications in the Federal Court in criminal matters which would include, as of necessity, one under Rule 137. It provides that a copy of the application shall be filed '… in the Registry of the Court of Appeal where the judgment, order or decision complained of was given or made'. This relates to a complaint in respect of a judgment, order or decision of the Court of Appeal. It is implicit that r 99 does not give the right to make the C complaint but only prescribes the procedure to be followed when there is a complaint. Under the Rules of the Federal Court, there is no other rule dealing with the right to make such a complaint except for r 137. An application may therefore be made to the Federal Court in respect of a complaint regarding any judgment, order or decision of the Court of Appeal. Rule 99(2) makes it clear that such a D complaint is different from an appeal. It follows that an application may be made to the Federal Court under r 137 even in respect of matters decided by the court of Appeal. The result of the context and wide range of r 137 is that the words 'the Court' in part (c) must be construed as 'any Court' and not as provided in s 2 of the Rules of the Federal Court. Such a departure from the meaning given to a particular word in the definition clause of a statutory provision is permissible if the E context in which the word is used warrants it as explained by this court in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd*. Thus, the Federal Court may review decisions made by the Court of Appeal in the exercise of its inherent powers.

[53] It is now appropriate to consider the characteristic features of the inherent F jurisdiction of the Court and the circumstances in which resort can be had to it. In *Rama Chandran v The Industrial Court of Malaysia & Anor,* Edgar Joseph Jr FCJ considered the salient features of the jurisdiction by referring to various parts of the article by Sir Jack Jacob. In defining inherent jurisdiction the learned author of the article said at p 51:

G … the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

H **[54]** In explaining the relationship between the inherent jurisdiction and rules of court, the learned author said at p 50:

The powers of the court under its inherent jurisdiction are complementary to its powers under rules of court; one set of powers supplements and reinforces the other. The inherent I jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the rules.

[55] The learned author then distinguished between inherent jurisdiction and statutory jurisdiction as follows at p 24:

The source of the statutory jurisdiction of the court is, of course, the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law; so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.

[56] The learned author then directed attention to the point that powers conferred by rules of court are generally additional to and not in substitution of powers arising out of the inherent jurisdiction of the court in these terms at p 25:

The inherent jurisdiction of the court may be exercised in any given case, *notwithstanding that there are rules of court governing the circumstances of such case.* The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction. (Emphasis added).

[57] In explaining the juridical basis of inherent jurisdiction, the learned author said at p 27:

… the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law.

[58] And in the next paragraph, in explaining the usefulness of the inherent jurisdiction, the learned author added at pp 50 and 51:

On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by rules of court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment.

[59] In India, there are also specific provisions of law dealing with the inherent powers of the court. They are similar to r 137. Section 151 reads as follows:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

[60] Section 482 of the Indian Criminal ProcedureCode ('s 482') reads as follows:

> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

[61] Indian authorities on the scope and limitations on the exercise of the inherent power of the court would therefore be of relevance in the application of r 137. The power is undefined and indefinable and must be exercised with great caution. It has to be exercised sparingly with circumspection and in the rarest of rare cases (see *Kurukshetra University v State of Haryana* AIR 1977 SC 2229). It must be so exercised only where resort to it is justified by the tests laid down in the section itself which provides for inherent jurisdiction (see *Talab Haji Hussain v Madhukar Purshottam Mondkar* AIR 1958 SC 376). It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist (see *State of Punjab v Kasturi Lal* 1999 SC 2554). It is in addition to and complementary to the powers conferred under the Code of Civil Procedure and cannot override the provisions of the Code (see *Manoharlal Chopra v Seth Hiralal* AIR 1962 SC 527). It is not intended to enable a court to create rights in the parties, but is meant to enable the court to pass such orders for the ends of justice as may be necessary considering the rights which are conferred upon the parties by substantive law (see *Shantaram Tukram Patil v Dagubai Tukram* 1987 Bom 182). The inherent power cannot be exercised when the Code of Civil Procedure itself provides for a particular situation or contingency or points out to the procedure to be adopted (see *A Venkateswara Rao v K Sibaiah* AIR 1978 AP 403). It cannot be invoked to nullify an express statutory provision (see *Mahesh Chandra Gupta v State of MP* AIR 1991 MP 226). Nor can it be invoked to override an express provision of law prohibiting interference (see *Pambhi v State* AIR 1952 All 526), or to pass an order which would conflict with the provision of the Code of Civil Procedure (see *Re Gurunath Narayan Betgori (Criminal Revision Application No 80 of 1924)* AIR 1924 Bom 485), or to extend the powers given by the statute (see *Marudayya Thevar v Shanmugasundara Thevar* AIR 1926 Mad 139), or where there is an express provision in the statute (see *Vishnu Deshpande v Emperor* AIR 1941 Nag 97). It is not usually invoked when another remedy is available, eg a civil proceeding (see *Re Lloyds Bank (Criminal Application for Revision No 261 of 1933)* 35 Cr LJ 1028) or an appeal (see *Hari Shankar Dinanath v State of Madhya Pradesh* AIR 1953 Nag 254). Thus where an order of court is appealable the court cannot exercise its inherent powers to rectify an error when there is a failure to appeal. In this regard reference may be made to *Balmer Lawrie and Co Ltd v Assam Brook Estates Ltd* AIR 1979 Cal 64 where Bonnerjea J said at p 66:

> The order dated 6 July 1978 was an appealable order under O 43 R 1(f) but the petitioner did not prefer any appeal therefrom. The result is that the order has become final and binding on the petitioner. The inherent power of Court cannot be invoked for neutralising the effect of the order dated 6 July 1978. In AIR 1970 SC 997 at p 998 (*Nain Singh v Koonwargie*) it has been held as follows:
>
> > Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other

words the court cannot make use of the special provisions of s 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further, the power under s 151 of the Code cannot be exercised as an appellate power.

Mr Sinha is asking the court to use the inherent power to restore the defence and extend time for filing affidavit of documents, unless the court sits on appeal over the order dated 6 July 1978, none of the prayer in the petition can be granted. Mr Sinha, in fact is asking the court to use the inherent power as an appellate power which is completely disapproved by the Supreme Court.

In AIR 1962 SC 527 (*Monohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*), the Supreme Court held at p 537:

Inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by s 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provisions should normally be regarded as exhaustive.

Any order passed on this application in terms of the prayer in the petition will have the effect of setting aside the order dated 6 July 1978 and would amount to exercising inherent power as an appellate power. In view of this, I have no jurisdiction to entertain this application as the same is misconceived. In the premises, this application is dismissed with costs.

[62] Where, however, there is no right of appeal the court may exercise its inherent powers to rectify an error. In this regard *The Code of Civil Procedure* (5th Ed) Vol I by AN Saha says at pp 666–667:

In an *Orissa* case on the death of decreeholder during execution proceeding, the alleged legal representatives of the deceased decree-holder sought to be substituted but the petition was wrongly rejected. An application to recall the order was dismissed for default. The legal representatives filed an appeal against refusal to recall the order. But the appeal plainly was not tenable. It could not be treated as appealable on the footing that refusal to recall the order was an order under Order IX, Rule 9, CPC, because Order IX does not apply in execution proceeding. Against the order dismissing the appeal, a revisional application was filed. The revision failed because the appeal was not at all competent. Nevertheless the High Court under the inherent power set aside the order rejecting the application for substitution and directed the executing Court to reconsider the same (*Sarat Chandra Patra v Narsingha Patra* AIR 1988 Ori 4: (1987) 63 Cut LT 86: (1987) 1 Ori LR 355).

[63] The majority judgment of this Court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* demonstrates the application of this rule. In that case the appeal was grounded on the validity of the record of appeal which had been held by the Court of Appeal to be defective. It was unanimously held that the matter was not appealable. However, the majority proceeded to rectify the error with Steve Shim CJ (Sabah and Sarawak) and Mohtar Abdullah FCJ making express reference to r 137 as the basis of authority to do so.

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